

ASBESTOS POSES PROBLEMS FOR BUILDING OWNERS AND LENDERS

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Increasingly stringent asbestos cleanup laws and a wave of lawsuits are imposing substantial legal and financial burdens on owners and operators of commercial buildings with asbestos-containing materials (ACM). As a result, landlords are having problems finding tenants: owners are offering steep discounts to lure reluctant purchasers and buyers are having problems lining up lenders and other institutional investors who are fearful of becoming targets of lawsuits.

Asbestos which is actually a group of six fibrous minerals (chrysotile, crocidolites, amosite, anthophyllite, tremolite and actinolite) is one of the most dangerous substances known to mankind. Asbestos fibers are extremely durable and may remain suspended in air for extended periods of time. If inhaled, the fibers may become lodged in the lungs and the gastrointestinal tract where they may cause lung cancer, respiratory disorders such as asbestosis as well as cancer of the esophagus, stomach, colon and rectum, and mesothelioma, a rare cancer of the chest or abdominal lining. An estimated 10,000 deaths have been attributed to asbestos.

Until the dangers of asbestos became known, asbestos was used extensively to insulate, fireproof and soundproof the vast majority of commercial buildings constructed between 1920-1970. Asbestos is also found in cement products, acoustical plaster, wallboard, ceiling tiles, vinyl floor tiles, roofing materials and waterpipes. Indeed, a recent study published by the United States Environmental Protection Agency (EPA) found that 733,000 public and commercial buildings in the United States have ACM and 500,000 of those buildings will require some sort of cleanup work. A separate report conducted by New York City revealed that 68% of the buildings surveyed contained asbestos and that 87% of those buildings posed some risk to their occupants because the asbestos was damaged.

FEDERAL AND STATE REGULATIONS

Despite the hazards posed by ACM, it was not until the EPA began aggressively enforcing existing federal asbestos regulations and states began adopting asbestos cleanup laws that building owners and institutional investors became concerned about asbestos.

Asbestos is regulated by the federal government under three separate laws. Regulations adopted under the Clean Air Act ban spray applications of ACM in new buildings and also establish procedures for demolition and renovation of buildings containing friable asbestos which is asbestos that may be squeezed into powder by hand. All owners or operators of a building that has friable asbestos must notify the EPA at least 20 days before commencing demolition or renovation work and provide the agency with such information as the name and address of the owner or operator, description and location of the building being demolished or renovated and an estimate of

the amount of friable asbestos in the building.¹ If the amount of friable asbestos within the building exceeds 260 linear feet or 160 square feet, the owner or operator must also follow certain workpractices designed to control asbestos dust emissions during removal and storage.² Materials containing friable asbestos must be properly disposed of at an approved waste disposal site.³ If an owner or operator fails to comply with these regulations, the government may seek an injunction halting the operation and assess penalties.

Because the EPA perceives that there is only a 50% compliance rate with the workpractice rules at construction sites, the agency has been aggressively enforcing these asbestos regulations against contractors and building owners. In *United States v. Geppert Bros., Inc.*⁴ the EPA brought a civil action against both the demolition contractor and the building owner for failing to comply with the asbestos regulations. The owner of the building argued that the regulations only applied to contractors who are actually performing the demolition work and not building owners. However, the court held that the owner of a building that is being demolished becomes an owner or operator of a demolition operation by purchasing the services of the contractor.⁵

Likewise, in *United States v. Tzavah Urban Renewal Corp.*⁶ an owner of an hotel was enjoined from completing renovations and ordered to abate violations of the asbestos regulations. In that case, piles of unwetted ACM remained uncovered for over a year despite the issuance of several compliance directives. The building owner argued that the EPA was not entitled to relief because he had not knowingly violated the federal asbestos regulations. However, the court likened improper removal of ACM to engaging in "ultra-hazardous activity" and said the owners must therefore be strictly liable for their failure to comply with the regulations.⁷

Recently, the EPA also filed suit against the Consolidated Edison Company in New York charging that the company failed to notify federal authorities when it removed ACM from turbines, boiler doors and other equipment in 11 buildings and is seeking civil penalties in excess of \$1 million. In addition, past and present employees of the company have filed a multi-million suit asserting that they have been exposed to harmful amounts of asbestos.

The EPA has also promulgated asbestos regulations under the Toxic Substance Control Act. These rules impose mandatory inspection and asbestos control programs on an estimated 35,000 school buildings and also provide for a phased-in ban on the manufacture, importing, processing and distributing of products containing asbestos.⁸ Finally, the federal Occupational Safety and Health Administration (OSHA) has established limits on asbestos exposure levels in workplaces including renovations in buildings with ACM.⁹

While federal law does not currently require inspection and asbestos control programs for commercial and public buildings, 38 states and many cities have enacted local rules that mandate inspections and abatement programs and also

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require asbestos abatement contractors to be certified. For example, New York City's Local Law 76 requires the inspection of any building except single family homes with ACM before renovation or demolition can begin. In addition, the city requires that ACM be wet down, sealed, labeled and separated from other debris when removed. Violations of these provisions may subject the offender to fines of up to \$25,000 per day and/or imprisonment of not more than one year.

COMMON LAW LIABILITY

In addition to state and federal statutes regulating asbestos, owners and operators of buildings with ACM may also be liable under the traditional common law principles. For example, a building owner has a general duty to protect occupants and visitors from dangers of which the owner is aware. As part of this duty, an owner has an affirmative obligation to inspect and maintain a building and to warn persons who may be affected by the danger. Thus, an owner can be held liable if occupants or visitors are injured by exposure to asbestos which the owner knew or should have known existed and which was not repaired or removed. Furthermore, if the owner suspects that ACM is in the building but delays instituting abatement procedures, the owner may be found negligent for exposing plaintiffs to the asbestos. An owner may also be liable if a contractor negligently performs renovation work that exposes occupants to asbestos.

ASBESTOS ABATEMENT PROGRAM

Most of the asbestos in office buildings does not pose immediate health problems and abatement procedures will not be necessary unless ACM becomes friable or is disturbed. However, since nearly any interior alteration will disturb asbestos and most new tenants requiring some sort of office renovation, the asbestos cleanup laws can impose enormous costs on landlords and on tenants wishing to sublet excess space. Because landlords rarely reimburse tenants for the costs of abating asbestos, many tenants are now offering sublease space at bargain price if the sublessee is willing to take the space "as is" without alterations.

Asbestos cleanup can be very expensive and can cost as much as \$500,000 for a 20,000 square foot area. Indeed, one office building in Los Angeles required a \$50 million reserve for asbestos abatement. Asbestos abatement procedures can include simply encapsulating the ACM so that fibers will not be released into the air but on other occasions, entire floors must be gutted if the ACM has to be scraped away and removed.

Many financial institutions are shunning buildings with ACM because they are afraid they will be sued by victims of asbestos for wrongfully facilitating a sale of a building with ACM or fear that they will be liable as owners if they foreclose on the property and the ACM is mishandled or wrongfully disposed.

In order to minimize liability, owners should initiate asbestos control programs. A single employee should be designated as the asbestos coordinator who will be responsible for becoming familiar with asbestos compliance issues and for selecting qualified asbestos abatement contractors. A written Building Asbestos Plan should be developed outlining various asbestos control procedures. The location, condition and types of ACM should be assessed, periodic reinspections should be conducted to insure that ACM is not inadvertently damaged and a communication program should be established to provide building occupants with information about ACM in the building as well as asbestos reporting procedures. In addition, detailed records of all inspections, test results, corrective measures, warnings or communications with employees and occupants and other data should be maintained which may be used to establish defenses to liability.

Finally, lenders should conduct a detailed environmental investigation including an asbestos assessment prior to extending credit to prospective borrowers, advancing loans to financially-troubled debtors or foreclosing on default mortgages. If the survey reveals friable asbestos, the borrower should be required to undertake abatement procedures as a condition of the loan. □

- 1 40 C.F.R. 61.147.
- 2 Id.
- 3 Id. at 61.151.
- 4 638 F.Supp. 996 (E.D.Pa. 1986).
- 5 Id. at 999.
- 6 696 F.Supp 1013 (D.N.J. 1988).
- 7 Id. at 1021.
- 8 40 C.F.R. 673.
- 9 29 C.F.R. 1926.58.

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